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DISPOSING OF QUESTIONS OF FACT BY A SINGLE TRIAL.

At page 221 of 71 Central L. J. we reproduced article by Mr. Roscoe Pound, prepared for the benefit of a special committee of American Bar Association, under the title Principles of Practice Reform.

For that part of that article, which urges that all questions of fact should so far as possible be settled finally on one trial, this journal has heretofore displayed its emphatic sympathy. 69 Cent. L. J. 425. In an annotation by the writer prior to his editorial connection with this journal, numerous cases are collated, where courts either upheld the partial new trial theory squarely or applied it where the stress of circumstances demanded.

The latter class of cases may at least be deemed good authority on the question of power in the courts to give to litigants what they should be deemed to have fairly won in issues of fact. But that is a half-hearted way of acting on the part of a court of justice, for with courts, as with others, the power to do anything has its corelative obligation in duty.

We wish to repeat what we said at 71 Cent. L. J. 426, with a slight change in phraseology because of displacement from context. "Why should error as to a matter of law wholly disassociated from a question of fact overturn what has been fairly won after so much loss of time and expense? The public owes no duty to appellants whom the court says have no just complaint on this score, and if it does not, who has the right to jeopardize what the law says has been fairly earned? When our courts put that at hazard which has already been rightly decided, because of their fault in some other matter, what significance has the maxim *interest republicae ut sit finis litium*? And what in the way of practical results do those, who complain of old common law technicalities and refinements, get in comparison with what was obtained under common law practice?"

As Mr. Pound well observes, it was "one of the triumphs of Judge Doe in New Hampshire" that he worked out judicially that a new trial should only be of the question or questions with respect to which the verdict or decision is found to be wrong, if separable." See Lisbon v. Lyman, 49 N. H. 582.

The trouble, however, seems to have been, and still is, that appellate courts have not gone into cases, in which there is error in some one or more particulars, to discover separability. What seems to us to be needed is that in every decision where there is a remand with direction to grant a new trial the appellate tribunal should be required to certify to the court of primary jurisdiction the questions to be retried and declare what has been established by the trial already had. If a case is opened as widely on retrial as on the first trial, there should be a specific ruling that no finding involved in a verdict for plaintiff or defendant, as the case may be, is separable as uninfluenced by the error or errors committed in the former trial.

As appeals are taken now the record is scanned for error here and there and the general justice of the result and the general fairness of the trial are disregarded. What is done in the court of first impression and where practical administration of law demands something of expedition, because "the country" is called in to assist the judge, is looked at with a microscopic eye, which does not take in the wider view.

What lower courts and the juries and the litigants, whose time and sacrifice are assessed for the public good, have a right to expect from appellate courts, is that they shall not double their trouble. Appeal is a privilege and not a constitutional right, and as a privilege its benefits should be limited to the narrowest compass.

An appellate tribunal has in theory, and should have in fact, but one general function in remanding cases for new trial, and that is to show the trial court how to pro-

ceed correctly at the retrial. But may it not do this far more effectually in approving it in all that it has done correctly and limiting its action to that wherein it erred?

But further than that, does it not thus aid the law in enforcing respect for all that the trial court has correctly done? No practical man will tear down an entire wall because it is illy constructed as to an inconsiderable part, and no court would deny to the builder all claim for constructing it because of such a defect. The principle, however, of fair play and common justice, instinct in correcting error as error pure and simple, is involved, and the very simplicity of a rule of this kind needs no argument for its support.

NOTES OF IMPORTANT DECISIONS

BANKRUPTCY—IMPOSITION OF FINES ON MEMBERS OF BUILDING AND LOAN ASSOCIATION FOR FAILURE TO MAKE PROMPT PAYMENTS.—In the articles of a building and loan association it was provided that certain penalties should be enforced for shareholders neglecting to pay, when due, dues, premiums, loans or interest, and when those are in arrears, payments should be first applied to liquidation of fines. By another provision such fines are not imposed in case of a member's death. It was lately held in a U. S. District in New York, that as death—"creates a situation very similar to that of bankrutcy," the policy manifested in the former should be applied in the latter. In re Davis, 180 Fed. 148.

It seems not to be disputed by the court at all, that fines would be imposed, but for the exemption in case of death. It is also a familiar rule that exceptions should not be extended beyond their plain import. Another rule, also much resorted to, is that the expression of one thing excludes another. The court here seems to us to proceed in the teeth of both of these rules, and to have made a judicial interpolation in a contract.

The court says: "Bankruptcy in this case was not a voluntary act. It was a misfortune and should not work to the advantage of the association or to the detriment of the estate in bankruptcy." Here it would look like the suggestion of still another classification, viz: between voluntary and involuntary bankruptcy. And, if we admit that, then with as much logic we might go and inquire whether a bankrupt's condition is brought about by foolish, indolent, reckless conduct, or whether one merely went under by stress of circumstances he could neither anticipate nor control. Courts wield no Ithuriel spear to put to flight inequities in contracts freely entered into by competent parties.

WHAT IS THE ESSENCE OF THE TRUST EVIL?

In an article which appeared in the CENTRAL LAW JOURNAL about a year ago, the writer, Mr. William L. Royall, argued that "the citizen has a natural and inherent right to compete in business with his rival even to the point of destroying that rival by fair competition, and that, even though he intend to destroy him: but that he has no right to inflict a malicious injury upon him that is not intended to be for his own benefit, but simply to inflict an injury upon his rival;" contending that the chief malicious injury of which the trusts were guilty consisted in giving away or selling their goods below cost for the purpose of injuring a rival.

"What is it," he asks, "that has stirred up popular wrath against the great and powerful corporations that the public denominate as trusts? It is the custom they have fallen into of giving their goods away or selling them below cost, which is pro tanto, the same thing for the purpose of destroying a weak rival, or driving him out of the business. * * * When a weak rival begins to cut into its profits, it commences giving its goods away, or selling them below cost for the purpose and with the intention of destroying that rival. * * * This is not the exercise of a citizen's right, but the abuse of it. * * * When the great corporations give their goods away for the purpose of destroying a weak rival, they are doing him a wanton injury, and are therefore doing an unlawful act. I ask particular attention to this word 'wanton.' It is the key to the situation."

After stating the wrongs of which the trusts are guilty Mr. Royall goes on to propose a remedy. He says:

"The first thing to be done is to amend the Sherman law so as to restrict it to all unreasonable restraints on trade and all agreements that aim at doing a rival a wanton injury, and to provide appropriate penalties and appropriate measures for enforcing the law. Then let Congress enact a statute as to interstate trade, making it unlawful for any person or combination of persons to give away goods or to sell them at or below cost, or so near thereto as to be in effect a sale at or below cost for the purpose, or within the intention, of destroying a rival in interstate business, or inflicting a wanton injury of any sort and forcing fair and equal competition. * * * Then let each state pass an act to the same effect relating to interstate trade."

In concluding, Mr. Royall declares that:

"Our institutions do not oppose men's or corporations' becoming rich. Upon the contrary they encourage them to become just as rich as they can get to be by fair trading. The rich men are the country's strength. * * * All that our institutions oppose is the rich men using the power that their wealth gives them to oppress weak men, and if the government will come between the rich man and the weak man and compel the rich man to desist from practices intended to crush the weak man, everybody will have his rights and the trusts will become a national blessing."

Many lawyers, perhaps the majority, entertain views similar to those expressed by Mr. Royall, but the great mass of the working men of the country and those who sympathize with them, look at the matter from a different view point. The trusts are the masters; there are other masters indeed, but they are becoming fewer as wealth aggregates and combines extend. To the workingman, therefore, the trust problem is the problem of labor and capital. The action of the trust in underselling and driving out a weak competitor lessens the number of employers to whom the workingman may apply for employment, and this is a serious matter for him, but there are other phases of the trust evil which interest him more. His status as one of an army of employees, and whether with the growth of trusts that status is to be an ascending or descending one is the great question for him. So, too, with the average citizen; the crushing out of weak rivals by selling at or below cost, he, no doubt, regards as an evil; but if he is one of those who feel that the trust evil is of great magnitude, he will not regard the underselling as the essence of the evil. He will see that the indirect evils flowing from the aggregation of wealth—the social and economic evils—will be much the same whether that aggregation result from underselling or from some other cause.

This broader view of the question presents a problem so vast, so intricate and one upon which so many varying opinions are entertained, that one may well be excused for diffidence in undertaking to discuss it. But it behooves every citizen to get as clear ideas on it as possible, for this is a necessary step towards a solution. The object of the present writer is, therefore, to enlighten himself, not others; for he dare hardly hope to contribute anything of value towards the solution of so difficult a problem.

In the first place, then, let us inquire whether, as Mr. Royall suggests, it is desirable that the rich men of the country should continue to grow just as rich as they can get to be by fair trading. This question is itself so large that very few of its aspects can be considered, and these merely in the most general manner.

What is wealth? We are not asking for an economic definition of the term; we are using it in its general popular sense. Wealth to many, to a deplorably large number, would be abundantly realized if they were assured of plenty to eat, drink and wear and of comfortable shelter. But those who have these things assured do not consider themselves, even well off, and many of them toil more incessantly than thousands of those whose existence would seem to depend directly upon intense struggle. Too often the passion for wealth grows as wealth accumulates, and the struggle for

accumulation is sometimes more severe than the struggle for existence. That mankind from the poorest to the richest should spend their lives in the eager, feverish pursuit of gain, to the neglect of those things which minister to the higher tastes, faculties and sentiments, no one would for a moment contend. No doubt there are multitudes of men who can employ their faculties in no better way than in the quest for gain. But is it desirable that these numbers should increase? Is it desirable that such men should come to dominate opinion to rule politically and socially? That the lawyers, the doctors, the preachers and teachers should feel that they must pander to them? But surely it is towards subservience to wealth that the love of wealth leads. No doubt it also leads to the enterprises that are so important as factors in settling and developing a new country, and the enterprising, wealth-pursuing men deserve their mead of honor. But even material development may reach its desirable limits, and will not those limits soon be reached at the rate at which material development is now proceeding? When the arid lands of the west are brought under cultivation, how much further can agriculture proceed? Does any thoughtful person desire to see it reach a condition such as that which prevails in China, where every available spot is used in the production of breadstuffs? Who wishes to see every solitude in mountain and forest invaded by lumber men and miners? Who wishes to see every water fall diverted from its course in order that electrical energy may be developed? Is there not a grandeur in the solitudes of primeval nature, a "spirit of the wood," which mankind would do well to commune with? There is surely a limit beyond which the enterprise which transforms the forest into lumber, which mars the beauty of the hills, the rills and the rocks should not pass. But in order that that limit be not overstepped, the higher qualities in man's nature must control the mere greed for gain.

But now let us look at wealth from a semi-economic standpoint and ask whether it is desirable that the rich should grow richer. The term wealth is used more or less interchangeably with capital property and riches. Property is perhaps a better term for our present purposes. The property of the rich man consists of land, machinery, buildings, mines, railroads and commodities, etc. The great steel corporation owns a large proportion of the steel plants in the United States. Is it desirable that this one corporation should own them all? Very likely there would result a reduction in the cost of producing steel. Certainly there would be a saving in the cost of selling it. And probably, or at least possibly, the public would obtain steel products at a lower price. This seems desirable. Again a few corporations own nearly all the railroads in the United States. If all lines were owned by one company no doubt the cost of transportation could be reduced. There would be no occasion for duplicating depot buildings in the same town. Paralleling and maintaining lines for the sake of mere competition would cease. The public might reap a benent in the form of reduced fares and rates possibly in the form of better service also. Again, there are great department stores in every large city. Suppose one great corporation owned all the retail businesses in a city. There would probably result a great saving in the cost of distributing retail commodities throughout the city; and it is not impossible that these commodities might be sold at a lower cost to the public. Take another case. Mr. Rockefeller is perhaps the richest man in the world. Suppose that he deemed it to his advantage and to the advantage of the country to get just as rich as possible; that, instead of endowing colleges, etc., he negotiated with the Canadian government for the purchase of millions of acres of prairie land in the Canadian west, and established great farming companies in that region. By the use of combined steam gang-plow, harrow and seeder, etc., he could produce wheat and other grains at a much less cost than

the ordinary farmer. He might even drive out many of the small farmers and buy up their land. He might continue these operations until he became owner of nearly all the Canadian west. And all this might possibly result in the reduction of the price of bread. So probably with nearly all industries; their organization and consolidation would probably result in reducing the cost of production and distribution. Is it, then. desirable that a few men should grow so rich as to be able to organize and consolidate all the industries of the land? From the economic standpoint alone; that is, from the standpoint that takes into consideration the mere cost of producing and distributing commodities, such organization and consolidation might be viewed with satisfaction. If, instead of giving away his fortune in his old age, Mr Carnegie were investing it in some productive enterprise, so that he might become just as rich as possible, he would be adding to the world's and to his own stock of commodities, instead of multiplying educational agencies. If at present the world were in need of those commodities; if, for example, there were great shortage of food, his millions might be used in the employment of thousands of men in the irrigation and cultivation of arid lands, and from the point of view that regards the rapid multiplication of mankind as the chief desideratum, rather than their moral and intellectual elevation, the production of food would be a great public benefit, while at the same time it would enhance his own fortune. So, if the mere multiplication and distribution of commodities be the end aimed at, that end will be best achieved if all rich men turn their attention simply to the production and manufacture of commodities, and the creation of a taste for the things thus produced. The volume of wealth would be increased more rapidly in this way, than if rich men devoted their accumulating riches to the encouragement of science art, literature, education and to those things generally that minister to the development of man's higher nature. Four million dollars might endow a college, but it would also build a great manufacturing plant for the manufacture of some new commodity for which a taste might readily be created by the proper kind of advertising. Rich men might multiply factories and commodities as fast as the rage for frills and fads increased. Forests might be cut down, mines exhausted and the hills and mountains turned upside down in the search for more. All this would involve the expenditure of tremendous energy, it would employ labor, and it is conceivable that by complete organization of the industries which now exist, and of those which would be developed, every able-bodied man in the country who was willing to work might for a number of years to come be employed in producing wealth. Universal prosperity might prevail, and the trust might seem to have become "a national blessing." This is not only conceivable, but many believe that it is towards a consummation of this kind that the trusts are working; that this constitutes industrial progress, that it is the natural and inevitable outcome of economic development, and as such, desirable. But it is easy to concentrate attention upon one phase of a problem, to regard the economic production and distribution of wealth as of primary importance, and to believe that when this end is fulfilled, the process which fulfills it will also fulfill all other desirable ends.

Let us look, then, at some of the social effects of the aggregation of wealth and the consolidation and organization of industries. Of these one of the most noticeable and among the first to be felt, has already been suggested, namely, the lessening of the number of employers, and consequently of competition among employers for labor. Where, in a single city, one corporation employs from twenty to thirty thousand men, it is manifest that the old notion of employers competing with each other for labor and thereby determining the price of wages, can hardly correspond with the facts. When one man has the power to order a lockout which would leave one hundred thousand men, women and children without the means of sub-

sistence, the lockout will not be prevented by any fear of competition. Suppose that there are several factories of the same kind and that there has been more or less competition among them, it will be manifest that in the matter of employing labor they should act more or less in unison. But even should they not do this, but on the contrary, compete to the fullest extent possible, a lockout which disengaged thirty thousand men, would necessarily leave a vast number unemployed, however anxious competing factories might be to employ them. It would be a physical impossibility for the few competing factories so to enlarge operations as to take on even half the men locked out by the competitor. But we are considering the result of aggregation and consolidation carried to its utmost limits, or at least to the extent of uniting under a single management all the different concerns engaged in the same class of business. Consolidation has not yet arrived at this stage, but it bids fair to reach it, or at least to approximate so closely to it that all competition among captains of industry will cease. Indeed, competition in the employment of labor among the greater "captains of industry" has probably altogether ceased; but lack of access to collected data confines us to a hypothetical consideration of the subject. We therefore assume that where one great corporation closes its doors against its employees, the latter are effectually barred from the kind of employment to which they are accustomed, and are thus almost totally deprived of the means of livelihood. Of course, a lockout is of unusual occurrence, and its significance as an incident of industrial consolidation rarely challenges public attention. The labor strike, which is the counterpart to a lockout, occurs more frequently, and its discussion occupies more space in the newspaper and in the public mind. But the lockout is a startling exhibition of the latent power of consolidated industry, of the trust. That a single person or a single corporation should have the legal right to say to a great army of men: "The trust has decreed that you shall starve," is a fact full of warning, and one which lawmakers cannot consider too earnestly. That the lives and happiness of thousands, even hundreds of thousands, should be in the keeping of a trust, seems strangely incongruous with constitutional provisions which profess to guard personal liberty and secure to each individual the right to pursue his happiness in his own way. Before the advent of the "captain of industry," the status of the workingman was altogether different. The competition among employers was something like a guaranty that if discharged by one he had merely to turn to another. Capital in the hands of many competing employers was sufficient assurance to the steady, industrious, competent man that he would rarely, if ever, lack for work. He was in no sense dependent upon the will of one employer for the exercise of his right to labor. He had the status of a free man, not merely in name, but in reality. He could look forward to the time when he might himself become an employer of labor. By economy and thrift a journeyman could in a few years save sufficient capital to set up in business for himself. This was true of the skilled workmen in most American industries until well on towards the middle of the nineteenth century. To-day, no doubt, the wages of the skilled workman purchase far more of the comforts of life than the wages paid sixty years ago, and this important fact compensates to some extent for the loss of that independence which the old competitive system of capital afforded. He does not feel his dependence so long as his wages continue, and the insidious absorption of his liberties through the silent process of economic development causes him no alarm. It is only during a period of panic or depression, or when he is blacklisted that his real situation forces itself upon his attention. He then feels what it is to be dependent upon one employer, and the union affords him the most convenient medium for minimizing the effects of that dependence. Thus the growth of the union, and the federations of labor has accompanied

and has been the natural result of the aggregation of wealth and the consolidation of industries.

We now come in view of some of the secondary effects of that aggregation and consolidation. The growth of the union is one of the immediate effects, the conduct of the union; the strikes, the boycotts, the violations of injunctions, collisions with the military and the police, the destruction of property and the loss of life are secondary effects. Who will undertake to trace the far-reaching effects upon the character, not only of the workingmen, but of the American people as a whole? What must the attitude of the individual workman be towards those who hold such tremendous power over him? It cannot be that of an equal, and is there any other attitude which befits an American citizen? That the workingman should not cherish antagonism towards the trust and those who represent it is hardly possible. His real antagonism will often be hidden by truckling subserviency. The personal relationship which under the old order of things subsisted between master and servant vanishes when the trust comes to be the employer. To the employee the trust becomes synonymous with capitalism, and capitalism he thinks of as his inexorable foe. In his struggle with this foe he has no chance save in the union, and in the union he speaks through the walking delegate. In his working hours he is a puppet among an army of puppets, performing mechanically the work of his daily routine, and his leisure hours are largely absorbed by the union, where he learns that the united action of all workers is necessary in labor contracts with the trust, that the nonunion man is his natural enemy; that the strike-breaker is a scab, a blackleg and a traitor; that loyalty to the union is the first duty of a worker; that obedience to its leaders is necessary, and that, in short, he is little less than a puppet in the union than in the factory. What conception of personal liberty and individual rights is possible to a man thus circumstanced? To the union he looks for protection, rather than to the law, for the law permits the trust to discharge him and even to blacklist him, while the union, if he is loyal, exerts its influence to prevent his discharge and to secure him employment when he loses his job. The conception of liberty and right which the union embodies will become his, and it should be no matter for surprise if he comes to regard the law as his enemy.

Another incident which necessarily accompanies the consolidation of industries is the driving of the small manufacturer and the small trader into the ranks of labor. The amount of discontent bred in this way must be very great. The position of the small trader and the small manufacturer was one of greater independence than that of the laborer under the old order of things, and their discontent is likely to be proportionately greater than his. They may be excused for believing that the rich are growing richer, and the poor, poorer, for such is the conclusion which their own experience justifies. They have been driven into bankruptcy or so near to it that they have felt obliged to sell out to the trust. They are poorer, absolutely, than they were, and the trust is richer, absolutely as the result of their decline. The laborer, in the transition from the old industrial regime, to that which the trust imposes, lost in the matter of independence, but gained by an increase of wages; but to the bitterness which comes from the loss of independence, the small trader and manufacturer, has had to add to the bitterness of increasing poverty.

And now let us ask, what it is that makes the trust so obnoxious? Undoubtedly the selling of goods below cost, or the giving of them away, for the purpose of destroying a small rival is especially detestable. But who can doubt the power of aggregated wealth to destroy a small rival without resorting to these means? What chance in the race for wealth has the man of small means with a multimillionaire? If the former succeeds in building up a fortune, it is because he chooses a field not occupied by the latter, or because of the latter's favor. There may perhaps be a

few industries where expansion beyond a certain limit increases the cost of the unit of output, and where this is so, he who keeps within that limit has an advantage over him who passes it. But in his chase for wealth the multimillionaire is not confined to operations connected with his main business. Money makes money, is the familiar adage, and everybody knows in what a multitude of ways the adage is applied in practice. "The destruction of the poor is their poverty," and everybody knows how often the failure to meet a small demand, will, under stringent circumstances, drive the poor man to the wall. It is the power which the law gives to wealth and the weakness which it impresses upon poverty which makes the rich man an object of fear; and it is because the rich man has the power to sell his goods below cost, to give them away, and still remain rich, that he is an object of hatred to the poor man who is thus driven out of business.

Let us now observe how the power of wealth varies with its form. The power which a single acre of land invests in its owner is not great. The law gives him the right to exclude the public from it, to fence it, to wall it, to cultivate it, to build upon it, and to dig to any depth into it; but when annexed to a single acre these rights involve but little power. But if ownership of an entire state should pass to one individual, it is manifest that the exercise of these rights would involve a power which no despot has ever dared to exercise. Had no individual ever owned more than a single acre, we would never have heard of the tyranny of landlordism. In a new country a few acres might be granted to private individuals without any reservation of public easements, but if all the land was so granted the necessity of subjecting the ownership of individuals to the requirements for railroads, streets, highways, etc., would soon become apparent. Absolute ownership of all the land of a country would involve absolute slavery. The owner of the land would own all its inhabitants. Hence it is easy to see why the ownership of land has been more qualified than the ownership of commodities.

But there is a class of commodities of which the absolute and entire ownership would give a power little less than that involved in the like ownership of land. We refer, of course, to the staple foods. An ownership such as would control the food of a city would make the owner master of its inhabitants. Similarly with an entire monopoly of clothing and the material from which it is made; so to a modified extent with the instruments for cooking food, and for manufacturing clothing; so, too, with agricultural machinery, and facilities for transportation; in short, the power which a monopoly gives varies with the necessity which exists for the thing monopolized

It is, of course, apparent that when an industry is completely consolidated and organized under one control, it is completely monopolized. That this final consummation will be achieved by international trusts does not seem impossible, and the power which such trusts would exert would certainly far exceed that of any which at present exist. But a consolidation which did not extend beyond the limits of the United States, would, under the law as administered, give a power ridiculously inconsistent with the spirit of federal and state constitutions. Ownership of commodities under the law as it now stands (unless the common law as to engrossing is still operative in America) means practically the right to exercise unlimited power over the commodities owned. If no one has any vested right in the farmer's wheat save himself he has the right to throw it to the birds or burn it if he feels so disposed. This would not constitute the common law crime of engrossing; for in the case of a small farmer such waste would cause no perceptible injury to anyone save himself. But if farming were monopolized by a trust composed of half a dozen Rockefellers, the power which the law, as administered, annexes to the ownership of a commodity as a safeguard of individual rights, would become a power to destroy not merely individual rights and

individual lives, but the lives of a multitude. It is very true that no would apprehend the exercise of any such power. But it is also true that the subjects of the most absolute monarch would not fear the exercise of his power in the wanton destruction of property with the design of blighting them with famine. There never was a sovereign who was not controlled to some extent by the public sentiment of the people. But a constitutional government involves a more specific limitation of power than that afforded by public sentiment. The laws which permit a trust to monopolize a commodity of general necessity or of general use, are as inconsistent with constitutional liberty as if they permitted a king or a chief executive to sell a monopoly in such commodities. What monopoly granted by an English ruler ever gave a subject such complete control of an article of general use as the Standard Oil Company now exercise? A monopoly in the hands of an individual is not so likely to be abused as one in the hands of a corporation. As Benjamin Franklin said: "A single person may be afraid or ashamed of doing injustice. A body is neither one or the other if it is strong enough. It cannot apprehend assassination, and by dividing the shame among them, it is so little apiece that no one minds it."

It has, however, been suggested that monopolizing was a crime at common law.[1] If that was, and still is the law the consolidation of an industry is a crime. This view of the law would but bring into more striking prominence the power of the modern trusts. It would show that their power is such that they have consolidated industries to the extent now reached in defiance of the criminal law, and that in spite of the law they are proceeding every day further to consolidate their industries.

We have not been able to find any modern exposition of the common law on this point, save that given by Mr. Royall; and his statement does not profess to be complete.[2] His argument is directed against the Sherman law, rather than towards the exposition of the common law. Blackstone discusses offenses against public trade, among which he enumerates monopolizing, engrossing, regrating and forestalling the market. He describes engrossing as "the getting into one's possession, or buying up large quantities of corn, or other dead victual, with intent to sell them again. This

(1) See Mr. Royall's article, 69 Cent. L. J. 244, 245.

(2) Mr. Royall says: "The common law was undoubtedly opposed to monopoly. In Rex v. Waddington, a man was convicted under the common law for buying up all the hops in the neighborhood of a village and thereby creating a monopoly in hops. Now, of course, this man did not buy up every pound of hops. Necessarily there were some hops that escaped him, but he had secured practically all of them. The common law meant therefore that no man should appropriate practically all of a thing.

"The Supreme Court has declared that when a combination of corporations secures a monopoly of an article in the channels of interstate trade, it restrains trade by ending the competition between those corporations that existed before the combination was formed. No one, I think, will feel disposed to quarrel with that declaration of the law.

"But the Supreme Court has also said that when it can be seen that a combination of corporations tends to create a monopoly, that fact also makes the combination obnoxious to the Sherman law, and that it dissolves that combination as much as it dissolves the combination that creates an actual monopoly. Is not this statement of the law one that would be well for the court to revise?

"What is to be the limitation in a case where the combination tends only to create a monopoly? In the last presidential campaign, Mr. William J. Bryan said, that no corporation or combination of corporations should be allowed to control more than 25 per cent of the business it was engaged in. Is the court prepared to adopt this as the limitation? If not, where will it draw the line? Will it draw it at 50 per cent or 99 per cent? Absolute monopoly is, of course, impossible, and practical monopoly is all that is had in mind when the subject is under discussion. But if that is all we are talking about is not the word 'tends' a very misleading one, and one that is fraught with great danger and much disaster?

"If the proposition as announced by the court is to be adhered to, will not this follow? There are six men engaged in the interstate leather business. One of them becomes so rich that he buys out the other five. He has ended the competition that originally existed between the six, and he has established a business that tends to create a monopoly. Will not the doctrine allow congress to provide that this man's business shall be broken up and destroyed?

"If the preceding portion of this article is sound, then the citizen has a natural right to acquire all the control of his business that he can acquire by fair dealing so long as he does not establish a practical monopoly, and that is one of his liberties in which the constitution protects him, and if the Sherman law destroys his business merely because it tends to create a monopoly, is it not striking radically at his rights as a citizen and depriving him of the liberties secured to him by the constitution?"

must, of course, be injurious to the public by putting it in the power of one or two rich men to raise the price of provisions at their own discretion. And so the total engrossing of any other commodity with intent to sell it at an unreasonable price is an offense indictable and finable at common law." Blackstone says that in his day engrossing, regrating, and forestalling the market were common-law offenses, punishable by fine or imprisonment. Thus they continued until abolished by statute 7 and 8, Vic. c. 24.[3] It might, therefore, be argued that these provisions of the common law were operative in the American colonies when they declared their independence, and so continue operative in the various states of the Union.

But, however this may be, in spite of the common law, in spite of the Sherman act, and of other acts aimed against combinations, the trust goes on developing. No doubt the chief reason for this is to be found in the economic advantages of consolidation. Is it to be expected that consolidation will cease so long as it lessens the cost of producing and distributing? One would be over sanguine to anticipate it. The trusts will find their justification in the public demand for cheap goods. So long as this demand continues the process by which it is supplies is not likely to be attacked with sufficient energy to stamp it out. When an evil is denounced by those who participate in its fruits the denunciations are not likely to be regarded as wholly sincere. The process of consolidation is so gradual that those who are driven out of business form a small proportion of the whole people; the bitterness of their complaints is shared by only a small body of citizens, and time begins to heal their wounds before their numbers are greatly augmented. Thus, so long as consolidation results in lessening the cost of production and the prices which the public pay, it is not likely that it will cease until it has spread over all the great industries.

The imperative necessity for checking the aggregation of wealth or curbing its power may be strikingly illustrated by considering how speedily vast fortunes would absorb the entire wealth of the country if their owners continually reinvested their incomes in productive property. Assume that four billion dollars represents the entire property of a dozen of the largest combines in the United States. Assume also that this mass of wealth yields a net income of 5 per cent per annum for reinvestment. If this rate of increase were maintained upon the original capital and the sums reinvested from year to year the resulting aggregation would within the lifetime of many now living exceed the combined value of all the railroads, the agricultural land, the machinery, factories, live stock and merchandise in the United States. If it were possible for the same rate of aggregation to continue for five hundred years, and if the result were represented in gold dollars, the entire earth, if made of solid gold, would not suffice for the necessary coinage. These facts appear somewhat startling at first, but they become quite credible when we reflect that almost all the wealth of the country produced from year to year is also consumed from year to year, and hence a very large proportion of the surplus, viz., the portion not consumed, is at the disposal of the few very rich men of the country. Without actual information on the subject we are safe in hazarding the guess that of one year's produce there is never anything like two hundred million dollars permanently saved. Scarcely any form of wealth, except land, can be regarded as indestructible. Even the coinage of a nation disappears in time; and it is safe to say that a concern invested with the power of drawing an annual tollage from the nation's wealth of the value of two hundred million dollars, and having every facility for choosing durable and productive property for reinvestment, would in an astonishingly short time become the owner of all the property in the country having anything like a permanent value. That the United States is not very much nearer to this state of things is probably due to the fact that rich men are by no means bent on becoming just as rich as they can get to be. Should they cease to be influenced by those considerations which now prompt them to donate millions to public uses and devote their entire attention to accumulation, who could doubt the result under the law as it has been administered?

Is it not, therefore, clear that the essence of the trust evil is the evil which appertains to all great aggregations of wealth, namely, the overwhelming power which the law confers upon the owner, whether the owner be an individual or a corporation?

W. A. Coutts.

Sault Ste. Marie, Mich.

(3) Cooley's notes, B. B. 4, 158.

ESTOPPEL—ELEMENTS OF

IRWIN v. SOVEREIGN CAMP OF WOODMEN OF THE WORLD.

Supreme Court of New Mexico, July 27, 1910.

Where the defendant admits liability and advises and requests plaintiff to bring suit in order to dispose of the conflicting claims of a third party, and for no other purpose, he will not, after plaintiff has begun suit and incurred costs, be permitted to deny liability.

Appeal from District Court, Chaves County; before Justice Pope.

Action by Cordelia Irwin against the Sovereign Camp of the Woodmen of the World. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

This action was brought by the appellant against the appellee to recover the sum of $1,000, the amount of the beneficiary certificate issued by the appellee to one Thomas F. Estes, a member of the appellee order. Shortly before his death, the said Estes had made a change of beneficiary by which the appellant was named in the place of one Rita Diaz. The record shows that appellant had regularly adopted the said Estes as her son, and she was named in the beneficiary certificate as foster mother and dependent of the said Estes. Due proofs of the death of Estes were made to the company according to the rules and regulations, and proofs also of the relationship of the appellee with deceased. Thereafter, the appellee issued its warrant for the amount of the beneficiary certificate payable to appellant. The appellant deposited the same in the Citizens' Bank of Roswell, N. M., for collection. Upon presentation to appellee, payment was refused by it for the reason that Rita Diaz had in the meantime asserted a claim to the fund.

Thereafter some correspondence was had with the chairman of the Sovereign Finance Committee of the appellee, the said committee being empowered by the by-laws of appellee, to pass upon and approve all claims made against it, in which the said chairman explained to the clerk of the local lodge, to this appellant, and to her attorneys that said committee considered her (the appellant) as the rightful beneficiary for the reason that she had adopted Estes as her son, that had it not been for the adverse claim of Rita Diaz she would have been paid, and further wrote to the Counsel Commander of the local lodge at Roswell to see if he could not get the attorney of Rita Diaz to withdraw his objections so that the appellant could be paid, or to see that "suit is brought against the order by one party or the other to recover the amount of the certificate, and we will interplead the money into court and let that tribunal settle the matter. It does seem too bad that a part of this certificate should have to be used up in attorney and court fees to determine the rightful beneficiary. I hope the officers of your camp can bring such influence to bear upon these parties to see that Mrs. Irwin is not made to go to court to recover the amount of this certificate. We hope that you will see Attorney Gatewood, and if he does not bring suit against the order we will not allow any unnecessary delay to keep us from making the payment of this claim, as we desire to pay our claims promptly." Later, on January 10, 1908, in a letter to the attorneys of the appellant, the same officer informed them that "our committee have been notified by Attorney W. W. Gatewood, representing Rita Diaz, to withhold the payment of this claim from any party excepting her. This you will see makes contesting claims under this certificate, and we feel that we should protect the order in this matter. We presume that it will be necessary for one of the contesting parties to bring suit against the order, and we can interplead the money into court, unless they can settle it between themselves as to who is the rightful beneficiary." Suit was then brought by appellant in the district court of Chaves county, in which suit the said Rita Diaz intervened and set up her claim. The case was tried by jury. The appellee defended on the ground that the contract was ultra vires and void. The court directed a verdict in favor of appellee and rendered judgment therein against both the appellant and Rita Diaz, from which judgment this appeal was prosecuted. Rita Diaz has not appealed.

Reid & Hervey, for appellant. D. W. Elliott, for appellee.

MECHEM, J. (after stating the facts as above.) From the view we take of this case it will be unnecessary to discuss the numerous assignments of error, for the judgment of the lower court must be reversed and judgment entered for the appellant. In Moore v. Beiseker, 147 Fed. 367, 77 C. C. A. 545 (Eighth Circuit) the court said: "In Kansas Union Life Insurance Company v. Burman, 141 Fed. 835 (73 C. C. A. 69), where an insurance agent for the insurance company, under a salary contract and for certain commissions, sent in his resignation to the company specifying certain grounds therefor, which did not include the objection that the insurance company had failed to renew its license in the state where the agent was operating under the contract, and in his suit to recover dam-

ages for a breach of the contract for employment, he assigned, inter alia, such failure to renew the license as a ground for recovery, it was held that he was estopped from alleging such ground as the cause of his resignation. The court said: 'It is a wholesome rule of law, instinct with fair play, expressed by Mr. Justice Swayne, in Railway Company v. McCarthy, 96 U. S. 267, 24 L. Ed. 693, that "where a party gives a reason for his conduct and decision touching anything in a controversy, he cannot, after litigation has begun, put his conduct in another and different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law." This principle has been applied in the following instances: Davis v. Wakelee, 156 U. S. 690 [15 Sup. Ct. 555] 39 L. Ed. 578, where a bankrupt obtained his discharge, claiming that the judgment against him was not affected by it. It was held that he could not, in a subsequent action on the judgment, deny its validity. In Davis, etc., Company v. Dix [C. C.] 64 Fed. 411, where it was held that the purchasers of a creamery repudiating the contract on the ground of fraudulent representations could not thereafter set up an interpolation in the contract. In Harriman v. Meyer, 45 Ark. 40, where it was held that the defense that a tender was not made in ready money was not admissible where the prior objection was to inadequacy of price,'" etc. Also in Farmers' Milling Co. v. Mill Owners' Mutual Ins. Co., 127 Iowa, 314, 103 N. W. 207, where it is said: "After distinctly and definitely resting denial of liability upon the ground that the policy was suspended and canceled because of nonpayment of assessments, the defendant cannot be permitted, after suit has been brought and costs incurred by the plaintiff, to mend its hold and assert some other ground of defense." And in the case of Continental Insurance Company v. Waugh, 60 Neb. 348, 83 N. W. 81, the rule is applied as follows: "Having assigned as a reason for refusal to pay the alleged failure of the assured to preserve his books of account, and presenting that objection alone as a justification for disavowing its liability under its contract of indemnity, it cannot, after litigation is begun, be heard to urge other and additional grounds for refusing the payment for the loss sustained." See, also, Supreme Tent K. of M. of the World v. Volkert, 25 Ind. App. 627, 57 N. E. 203, and cases cited.

This general rule is laid down in 16 Cyc. 786, in the following language: "So where a person has acted or refrained from acting in a particular way upon the request or advice of another, the latter is estopped to take any position inconsistent with his own request and advice, to the prejudicce of the party induced to act."

The appellee having admitted the validity of appellant's claim, and having refused payment solely for the reason of a contesting claim by Rita Diaz, and having advised appellant and her counsel to bring suit, which was to be friendly and uncontested by it as far as appellant was concerned, and for no other purpose than to dispose of the claim of Rita Diaz, appellee will not be permitted, after appellant has begun suit and incurred costs, to interpose another defense.

The judgment of the lower court is reversed and remanded with directions to the court below to reinstate the case upon the docket and enter judgment in favor of the appellant, Cordelia Irwin, for the amount due on the beneficiary certificate sued on, with such interest and costs as the law provides. And it is so ordered.

ABBOTT, McFIE, and PARKER, JJ., concur.

NOTE—*Estoppel in Insisting on Defense Where Liability Has Been Admitted.*—The principal case seems to have applied merely a general principle, as if it was not subject to any exceptions, and in each and every case it cites for support (or at least where the principle was involved), there appears to have been a reliance to the prejudice of the promisee. We take up each of those cases and supplement the references made by the opinion and think we establish our assertion.

In Moore v. Beiseker *supra* the opinion shows that parties were *acting* upon a mutual construction of a contract, one waiving his right to interest on a deferred payment, and the other claiming the right to interest was fairly offset by inability of seller to furnish abstract of title, which, if done, would have enabled the purchaser to safely pay and take possession, which possession would have been "the equivalent of interest."

In Insurance Co. v. Burman, *supra*, the court recognized that prejudice from reliance should appear. Thus it was said: "The rule should have especial application to this case for the palpable reason that had the defendant in error assigned as a reason for resigning his agency the neglect to renew the license, he would have afforded the company an opportunity to remove the objection." It seems evident that the court regarded what was said by Justice Swayne as merely a good general principle, and the case in which it was announced shows it was in no way involved. Thus the opinion says: "The question made by the company upon the Sunday law of West Virginia does not, in our view, arise in this case. We have already shown that the defendant proved upon the trial that it was impossible to forward the cattle on Sunday for want of cars. And it is fairly to be presumed that no other reason was given for the refusal at that time. It does not appear that anything was said as to the illegality of such a shipment on the Sabbath. This point was an after-thought suggested by the pressure and exigencies of the case."

In Davis v. Walker, *supra*, the court said: "It is contrary to the first principles of justice that a man should obtain an advantage over his adversary by asserting and relying upon the validity of a judgment against himself, and in a subse-

quent proceeding upon such judgment claim that it was rendered without personal service upon him. * * * Davis obtained an order which he could only have obtained on the theory that the judgment was valid * * * and he is now estopped to take a different position."

In the Dix case, *supra*, which showed a subscription contract for shares of stock, the court said: "These respondents having placed their refusal to proceed on other grounds, and standing mute as to any claimed interpolation in the contract, the company had, in effect, their assurance that it might proceed in construction of the plant, subject only to loss in case any of the objections then interposed by them, and afterwards pleaded, should prove to be true in fact and valid in law. This is clear equity as it is natural justice."

Harriman v. Meyer, *supra*, shows a mere waiver and thus the Arkansas court treated it. It is like the Burman case in what is said about "opportunity to remove the objection."

In Milling Co. v. Ins. Co., *supra*, it was said: "Appellant contends that it matters not what reason was given for the cancellation; the real question being, was the policy cancelled? But the validity of the cancellation depends upon the ground upon which it was based." If the court had thought that the above contention were correct, the inference seems to be the defense would have been allowed.

In Ins. Co. v. Waugh, *supra*, the Nebraska court approves the statement of the rule by Justice Swayne in the McCarthy case, and then either *ex industria* or because it was unwilling to tie itself absolutely to such a sweeping declaration, it proceeds to show that what was urged in the case before it did not show a "breach" preventing recovery even if timely.

The Volkert case, *supra*, merely decided that where the insurance company received dues and assessments of a member after he had engaged in the liquor traffic, knowing he was so engaged, an estoppel arises. Who would doubt this?

The quotation from 16 Cyc. is the proper rule, but that means, if we apprehend it properly, that action or restraint and prejudice precede the assertion of a legal demand against the party who is estopped, not the incurring of trouble or expense as a consequence of such assertion.

In other words, the estoppel is to create a situation which will preclude defense when the right shall or may be asserted. We know that costs follow the judgment, but we have never heard that judgment follows the costs.

Judge Stone thus states the matter: "There are cases in which it is held that a party may by his admissions and conduct render himself liable to an action." Sullivan v. Conway, 81 Ala. 153, 60 Am. Rep. 142. This court later held that a defendant was not precluded from denying the truth of a ground of attachment that he was about to remove from the state, because he had casually so stated to plaintiff, because it was merely the expression of an intention and it was not made with the intention that plaintiff should act upon it. The court said: "The statement shows on its face that it was no more than a casual declaration made in relation to no business affair or transaction with Rogers, and never intended by Troy to be acted on by Rogers, or anyone else, in reference to any affair of business." Troy v. Rogers, 113 Ala. 131, 20 So. 999.

In Harrigan & White v. Thresher Co., 26 Ky. Law. Rep. 317, 81 S. W. 261, a note was given for an engine and it was agreed that, if the engine was not as warranted, the maker should have a credit for the difference between the price agreed to be paid and the actual value. By arrangement the note was made payable to a third party, who consented to this understanding. After its execution, the maker acknowledged his liability for the full face value. The court said: "Appellee's plea of estoppel cannot avail it, for the reason they do not plead nor show proof, that by any act or omission of appellants had they been placed in any more unfavorable position or suffered any loss."

In Pearson v. Brown, 105 Ga. 802, 31 S. E. 74, the syllabus, which in Georgia is the decision, announces that: "That the maker of a promissory note, after its maturity, addresses to the payee one or more letters in which he asks for indulgence and promises to pay the note if its collection is not pressed, will not operate to estop him from subsequently setting up the defense of partial failure of consideration, notwithstanding the facts upon which this defense is based were well known to him at the time he wrote the payee to the effect stated." The opinion says: 'It would seem that, while upon his urgent solicitation, Brown refrained from taking any legal steps to collect the note, he never by any agreement to extend its payment for any definite period surrendered his right to resort to his legal remedies at any time he saw proper to do so. Nor can it be said that, relying upon the naked promise of Pearson to pay the note as soon as possible, Brown has suffered any injury, or has been placed in any worse position than he otherwise would have occupied. Clearly, therefore, the doctrine of estoppel cannot be invoked in his behalf." And yet he did do some relying precisely as the promissor asked. This case shows there must be a substantial change in promisee's position. It is hard to see wherein the plaintiff in the principal case was placed at any disadvantage by the failure of the defendant to disclose its position. It was necessary for plaintiff to sue, but the fact that the occasion was a conflicting claim does not signify. If that opposing claim had not appeared, could not defendant have said it was not liable, because the member had forfeited its certificate and then set up *ultra vires?* If not, it ought to be true that the plaintiff had been misled into doing some act to the prejudice of plaintiff. But here is a mere question of legal liability, as to which defendant's officers gave a mere opinion. If, according to the Georgia case we cite, nothing was done but bring suit, the status of plaintiff to the demand was in no way changed. If there was no real liability, because of an incurable defect, no harm was suffered in withholding what it was, and no voluntary promise, without consideration could infuse life into it. It might be true that such a defense as was urged was inherently bad, because the member in his life had paid money to the corporation, but that is not what the case goes upon. It announces, in effect, that a voluntary promise to pay money into court to be interpleaded for and the bringing of a suit upon that expectation constitute an estoppel. No case that is referred to sustains any such position, and we say, respectfully, we believe none can be found.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Action**—Pleading.—An action for one's suffering cannot be joined with one for death.—Hendrick's Adm'r. v. American Express Co., Ky., 128 S. W. 1089.

2. **Adverse Possession**—Nature of.—The occasional sale of shell from a shell bank on the land claimed held not such adverse possession as to support a claim of title by limitations.—Allen v. Clearman, Tex., 128 S. W. 1140.

3. **Bankruptcy**—Assets.—Under U. S. Comp. St. 1901, p. 3451, a cause of action arising out of a personal wrong suffered by the bankrupt held not to pass to the trustee.—Hanson v. First Nat. Bank of Center, Tex., 128 S. W. 1147.

4.——Attorney.—The fact that a creditor of a bankrupt corporation is an officer of such corporation or its attorney does not deprive him of the right to vote on the election of a trustee on his own allowed claim.—178 Fed. 541.

5.——Trustee.—The setting aside of the election of a trustee held within the discretion of the district court, on the ground that it was brought about by votes on proxies improperly obtained for the purpose of controlling the election.—In re L. W. Day & Co., 178 Fed. 545.

6.——Bulk sales.—Where a sale in bulk not complying with Laws Me. 1905, c. 114, was made in good faith and for value, the seller's trustee in bankruptcy could only sue in equity for the goods or the money.—Gorham v. Buzzell, D. C., 178 Fed. 596.

7.——Contempt.—Taking and concealing of property of a bankrupt in his possession on adjudication punishable as contempt.—Clay v. Waters, C. C. A., 178 Fed. 385.

8.——Rescission.—To establish fraud on the part of a banker which will entitle a depositor to rescind the deposit contract and recover his deposits from the banker's trustee in bankruptcy, the depositor must show that the bankrupt was insolvent when he received the deposits and knew it, while the depositor did not know it.—In re Stewart, D. C., 178 Fed. 463.

9.——Conditional Sales.—Whether a conditional seller of goods to a bankrupt in Mississippi is entitled to reclaim them after bankruptcy must be determined according to Mississippi law.—In re Agnew, D. C., 178 Fed. 478.

10.——Annuities.—Where a bankrupt purchased an annuity, payments on which were to begin July 1, 1916, in fraud of creditors, the execution of the contract was not a payment of value so as to preclude a vacation of the transaction by the trustee.—Smith v. Mutual Life Ins. Co. of New York, C. C., 178 Fed. 510.

11.—Reversion to Bankrupt.—Where a trustee in bankruptcy failed to prosecute a claim held by the bankrupt, and the proceedings were closed, all the property of the bankrupt, including the claim, reverted to him.—Hanson v. First Nat. Bank of Center, Tex., 128 S. W. 1147.

12. **Banks and Banking**—Collections.—Relation of trustee and cestui que trust held to exist between a bank and the owner of drafts sent to the bank for collection, so that the proceeds could be followed in the hands of the bank, if traceable.—American Can Co. v. Williams, C. C. A., 178 Fed. 420.

13. **Broker**—Compensation.—A broker, acting without the knowledge of defendant as agent for the other party to an exchange of property, and receiving compensation from the latter, is not entitled to compensation from the defendant.—Braden v. Sherer Town Lot & Immigration Co., Tex., 128 S. W. 1159.

14. **Carriers**—Delay.—To make a carrier liable for special damages for delay in transporting freight the special circumstances must be made known to it at the time of the making of the contract of shipment.—Gulf, C. & S. F. Ry. Co. v. Cherry, Tex., 129 S. W. 152.

15.——State Commissioners.—Where statutory or penal consequences are sought to be inflicted for violating the provisions of an order of the Texas Railroad Commission, it should receive a strict construction, and be enforced no further than it provides.—Texarkana and Ft. S. Ry. Co. v. Sabine Tram Co., Tex., 129 S. W. 198.

16. **Commerce**—Intra-State Business.— The construction of a glass factory by a foreign corporation held not interstate commerce.—Ft. Worth Glass & Sand Co. v. S. R. Smythe Co., Tex., 128 S. W. 1136.

17.——Jurisdiction.—The state courts are not without jurisdiction to interpret a tariff adopted by a railroad, though it is interstate and established and required by an act of congress.—St. Louis, S. F. & T. Ry. Co. v. Ross Oil & Cotton Co., Tex., 128 S. W. 1194.

18. **Conspiracy**—Presence of Accused. — The rule that the state in a criminal prosecution must show the presence of accused at the commission of the crime held subject to the exception that, where a crime is committed pursuant to a conspiracy, the presence of a conspirator is not necessary to his guilt.—State v. Bobbitt, Mo., 128 S. W. 953.

19. **Constitutional Law**—Commerce.—Oleomargarine act, requiring the packing in suitable packages, to be marked and printed in accordance with the directions of the Secretary of the Treasury, held not unconstitutional as a delegation of legislative power.—Lockwood v. United States, 178 Fed. 437.

20.——Delegable Power.—Grant of power to ascertain and determine appropriate facts as the basis for procedure in the enforcement of law is not a delegation of legislative power.—Hubbell v. Higgins, Iowa, 126 N. W. 914.

21.——Impairment of Contract.—A provision in a railroad charter exempting the railroad company from liability for causing the death of train employees held not a "contract" within the constitutional provision prohibiting impairing the obligation of a contract.—Texas & N. O. R. Co. v. Gross, Tex., 128 S. W. 1173.

22. **Contracts**—Privity.—A seller who is not a party to the contract between a bank and the buyer whereby the bank authorizes the buyer to make overdrafts in payment of goods, may not recover on a check given by the buyer as an obligation against the bank.—Continental Bank & Trust Co. v. Hartman, Tex., 129 S. W. 179.

23.——Repudiation.—A party to a contract who is notified that the adverse party has repudiated it, held entitled, without rendering further performance, to sue thereon.—Manzke v. Goldenberg, Mo., 129 S. W. 32.

24.——Telegraph.—Sending a telegram containing an offer and requesting an answer and

a delivery of an answer to a telegraph company of a message accepting the offer is an acceptance.—Western Union Telegraph Co. v. E. F. Connell Land Co., Tex., 128 S. W. 1162.

25. **Corporations**—Industrial School.—A statute making it unlawful for corporation to operate an industrial school without obtaining the consent of a majority of the voters in the precinct held not sustainable as an amendment to the charter of a corporation.—Columbia Trust Co. v. Lincoln Institute of Kentucky, Ky., 129 S. W. 113.

26.——Insolvency.—Under a statute giving preference in the distribution of the assets of an insolvent corporation to wages of mechanics, workingmen and laborers, the wages preferred and the class of persons within the statute depend upon the nature of the work done, and, if an employee is within the statute, his compensation is "wages," whatever its amount, and whether payable by the day, week, month or year.—Gay v. Hudson River Electric Power Co., 178 Fed. 499.

27.——Services.—Officer of a corporation cannot recover for services rendered it, except under an express contract.—Althouse v. Cobaugh Colliery Co., Pa., 76 Atl. 316.

28.——Stockholders.—Stockholders are liable for the full amount of their subscriptions, notwithstanding wrongful credits on the notes given therefor.—Wait v. McKee, Ark., 128 S. W. 1028.

29.——Suit by Stockholders.—A minority stockholder may sue in behalf of the corporation defaulting officers to recover corporate property fraudulently appropriated by them for the redress of other fraudulent and ultra vires acts.—Falfurrias Immigration Co. v. Spielhagen, Tex., 129 S. W. 164.

30. **Costs**—Statutes.—As a rule, costs and expenses incurred in legal proceedings must be authorized by statute in order to impose them on a defendant in addition to the debt or obligation.—Fitzsimmons v. Bonavita, N. J., 76 Atl. 313.

31. **Criminal Law**—Accomplice—One who was furnished money by the police to play at a crap game in order to procure evidence for a prosecution was not an accomplice of one prosecuted for maintaining the gaming table.—State v. Lee, Mo., 128 S. W. 987.

32.——Bar.—Acquittal of receiving stolen goods bars trial of the same person for theft.—State v. Fox, Conn., 76 Atl. 302.

33.——Circumstantial Evidence.—In a prosecution resting on circumstantial evidence, it is improper to single out circumstances and instruct affirmatively on them.—Moore v. State, Tex., 128 S. W. 1115.

34.——Jeopardy.—An acquittal of a charge of murder committed at the time of an attempted arson is not a bar to a prosecution for arson.—State v. Bobbitt, Mo., 128 S. W. 953.

35.——Motive.—The motive for doing a criminal act held not of itself evidence corroborating the testimony of an accomplice who committed the crime, implicating the accused.—Vails v. State, Tex., 128 S. W. 1117.

36.——Opinion Evidence.—Counsel who calls a witness to give opinion evidence may frame his question on such hypothesis as he thinks is reasonably warranted by the evidence.—Oborn v. State, Wis., 126 N. W. 737.

37.——Perjury.—Perjury committed by a witness in the federal court is a crime against the federal laws only.—McIntosh v. Bullard, Earnheart & Magness, Ark., 129 S. W. 85.

38.——Statutes—The Legislature may make the altering of marks on hogs, with intent to convert them to one's own use, punishable as grand larceny by making it punishable as if the animals had been feloniously stolen.—State v. Zehnder, Mo., 128 S. W. 960.

39. **Customs and Usages**—Contract.—A custom to constitute a fixed element of a contract must be certain, settled, and uniform, and known to the parties.—Manzke v. Goldenberg, Mo., 129 S. W. 32.

40. **Damages**—Shade Trees.—In an action for destruction of shade trees by fire, measure of damages is the difference between the value of the land before and after the fire.—Cleveland School Dist. v. Great Northern Ry. Co., N. D 126 N. W. 995.

41.——Evidence.—In an action of tort, accompanied with circumstances of malice, etc., evidence of the financial standing of defendant held admissible.—Schafer v. Ostmann, Mo., 129 S. W. 63.

42.——Liquidated.—Before liability to pay liquidated damages can attach, the party in default must have been guilty of substantial breach of agreement.—Werner v. Finley, Mo., 129 S. W. 73.

43. **Death**—Lex fori.—The rule that the right to recover damages resulting from personal injuries s governed by the law of the place where the injury was received held to apply to action to recover for injuries causing death.—Texas & N. O. R. Co., v. Miller, Tex., 128 S. W. 1165.

44.——Lex fori.—Jurisdiction to maintain an action for death of a locomotive engineer arising under a statute of another jurisdiction held not defeated because such statute makes the loss of society and mental anguish arising from the death elements of damage in a suit by the parents of deceased, and the law of the forum does not include those elements.—Texas & N. O. R. Co., v. Gross, Tex., 128 S. W. 1173.

45. **Dedication**—Intent.—An intent to dedicate land for a public use must be established by positive evidence.—Vance v. Village of Pewamo, Mich., 126 N. W. 978.

46. **Depositions**—Responsiveness of Answer.—Defendant may not have striken from a deposition an answer because not fully answering the question asked by plaintiff.—Henderson v. Louisiana & Texas Lumber Co., Tex., 128 S. W. 671.

47. **Domicile**—Insane Person under Guardianship.—An insane person wth a guardian of his property, but not of his person, may in good faith change his residence.—Ferguson v. Ferguson, Tex., 128 S. W. 632.

48. **Easements**—Forfeiture.—Right of way over defendant's land, whether denominated a license or an easement, held not forfeitable, except for breach of the condition on which it was granted.—Robbins v. Archer, Iowa, 126 N. W. 936.

49. **Electricity**—Extraordinary Care.—Handlers of electricity are practically insurers against danger to persons who may come in contact with their wires.—Capital Gas & Electric Light Co. v. Davis' Adm'r, Ky., 128 S. W. 1062.

50.——Negligence.—Proof that a live trolley wire broke and fell into a public street and injured a pedestrian held to raise a presumption of negligence.—Booker v. Southwest Missouri R. Co., Mo., 128 S. W. 1012.

51. **Eminent Domain**—Abutting Street Owners.—An abutting owner may recover for damages caused by heavy increase of traffic on the line of a railroad in a street.—Connor v. International & G. N. R. Co., Tex., 129 S. W. 196.

52. **Estoppel**—Warranty Deed.—The grantor in a warranty deed held estopped to deny a statement in the deed that it was for a valuable consideration.—Holloway v. Vincent, Mo., 128 S. W. 1009.

53. **Evidence**—Admissibility.—In an acton against a carrier for delay in transporting live stock, declaration by the conductor, made during a delay, held admissible against the carrier.—Missouri, K. & T. Ry. Co. of Texas v. Ramsey, Tex., 128 S.W. 1184.

54.——Description in Deeds.—Resort may be had to extrinsic evidence to fit a description in a deed to the land conveyed, but the descriptive words must furnish the key to the identity.—Colonial & United States Mortgage Co. v. Lee, Ark., 129 S. W. 84.

55.——Judicial Notice.—The court may take judicial notice of all the papers properly issued and filed or returned in the case.—Slater v. Roche, Iowa, 126 N. W. 925.

56. **Equity**—Laches.—Laches is an equitable doctrine, proceeding regardless of the statute of limitations to do equity, and is only applied to work out equitable results.—Adams v. Gossom, Mo., 129 S. W. 16.

57.——Opening Default.—Equity may open a default decree and permit a defense on the

merits where it was entered as the result of mistake or accident, or neglect of defendant's counsel.—Boyer v. Boyer, N. J., 76 Atl. 309.

58. **Forgery**—Evidence.—To justify a conviction of passing a forged instrument, the instrument itself must be introduced in evidence.—Muniz v. State, Tex., 128 S. W. 1104.

59.——Indictment.—Indictment for forgery of check held not required to allege whether the bank was a corporation, joint- stock company, or partnership.—Reeseman v. State, Tex., 128 S. W. 1126.

60. **Frauds, Statute of**—Oral Contract.—An oral contract for the sale of a crop not in existence is valid and any subsequent modifications of the contract may be proved by parol.—Reuber v. Negles, Iowa, 126 N. W. 966.

61. **Fraudulent Conveyances**—Husband and Wife.—Transactions between husband and wife and a third person, whereby the wife acquired in her name rights to real estate, held not in fraud of the husband's pre-existing creditors.—Lane-More Lumber Co. v. Bradford, Iowa, 126 N. W. 944.

62.——Insolvency.—A deed by an insolvent conveying his homestead and other property is valid as to the homestead, though invalid as to the other property.—In re Crocker's Estate, Iowa, 126 N. W. 962.

63.——Trust.—A grantor executing a deed to defraud his creditors may not create a trust in favor of a third person.—Roth v. Schroeter, Tex., 129 S. W. 203.

64.——Wife.—In action by husband's creditors over property which the wife claims, she must show that she paid for property from her separate estate.—Meighen v. Chandler, N. D., 126 N. W. 992

65. **Game**—Statutory Provisions.—One who delivers game birds to a carrier to be transported to a point out of the state, held, guilty of violating Code, No. 2555, though they are taken from the carrier by the state authorities within the state.—State v. Carson, Iowa, 126 N. W. 698.

66. **Gifts**—Savings Bank Deposits.—Money deposited in a savings bank may be conveyed by gift by delivery of the depositor's bankbook to the donee with intent to give him the deposit.—Union Trust & Savings Bank v. Tyler, Mich., 126 N. W. 713.

67. **Good Will**—Rights of Parties.—One who sold his interest in a firm business to plaintiff together with the good will thereof held to have interfered with the good will by soliciting trade from customers of the old firm.—Goetz v. Ries, 123 N. Y. Supp. 433.

68. **Grand Jury**—Membership.—That one held a commission as a deputy sheriff did not disqualify him from sitting as a grand juror.—Edgar v. State, Tex., 129 S. W. 141.

69. **Homestead**—Dower.—A homestead does not pass by mortgage where in the mortgage the wife only released her dower.—Weir's Trustee v. Weir, Ky., 129 S. W. 108.

70.——Mortgage.—One mortgaging his homestead and other property may insist that on a foreclosure of the mortgage the other property shall be first exhausted before a resort to the homestead is had.—Bankers' Life Ass'n v. Engleson, Iowa, 126 N. W. 951.

71. **Homicide**—Defense of Habitation.—Where one without fault is assaulted in his dwelling house, he need not retreat from his assailant, but may resist the assault even to the extent of taking the life of the assailant when necessary.—State v. Bissonnette, Conn., 76 Atl. 288.

72.——Nature of Act.—One shooting a gun in a direction other than at the person killed held guilty of homicide if he knew that his conduct was dangerous to human life.—Oborn v. State, Wis., 126 N. W. 737.

73. **Husband and Wife**—Agency.—A wife is her husband's irrevocable agent to pledge his credit for necesaries which he does not furnish so long as she is not separated from him by reason of her fault.—Hamilton v. McEwen, Mo., 129 S. W. 39.

74.——Community Property.—After divorce, if the community property is not disposed of by the decree, the former husband and wife are tenants in common of such property, and the former husband no longer represents the former wife of the community estate.—Roemer v. Traylor, Tex. 128 S. W. 685.

75. **Indemnity**—Right of Way Bond.—A bond given by a railroad company for a right of way over a forest reservation binding the railway's "successors," held to bind the surety for damages occasioned by the railroad's receiver.—United States v. Bailey, U. S. C. C. D., S. Dak., 178 Fed. 302.

76. **Indictment and Information**—Separate Offenses.—Selling intoxicating liquor and conveying intoxicating liquor from place to place are separate offenses and cannot be joined in the same information.—Champett v. State, Okl., 109 Pac. 124.

77. **Injunction**—Rights of Remainderman.—Equity will, at the suit of a contigent remainderman, on enjoining the life tenant or his grantee from committing waste, take an account of damages.—Watson v. Wolff-Goldman Realty Co., Ark., 128 S. W. 581.

78. **Insane Persons**—Restoration to Sanity.—The title of a lunatic to property devised to him by his father held to be good after the verdict of a jury that he had been restored to sanity, and his contract selling the same enforceable.—Wilcoxson v. Martin, Ky., 129 S. W. 96.

79. **Insurance**—Premium Notes.—Notes in part payment of a first year's life insurance premium stipulating the policy should become void on failure to pay the same at maturity held binding on both the company and insured, notwithstanding a clause in the policy declaring it, and the application should constitute the entire contract.—Marshall v. Missouri State Life Ins. Co., Mo., 129 S. W. 40.

80.——Proof of Loss.—A sworn statement of an insured as to the amount of a loss, although found to be excessive, does not constitute false swearing or misrepresentation which will avoid the policy, where it was made in good faith and there was room for an honest difference of opinion as to whether the loss was total or partial.—Spring Garden Ins. Co. v. Amusement Syndicate Co., C. C. A., 178 Fed. 519.

81.——Suicide.—Suicide includes the element of moral self-destruction, while an insane person may kill himself without the presence of such moral element.—Gavin v. Des Moines Life Ins. Co., Iowa, 126 N. W. 906.

82.——Suicide.—A substituted benefit certificate construed, and held not invalidated by the suicide of the member after three years from the date of the original certificate.—Wood v. Brotherhood of American Yeomen, Iowa, 126 N. W. 949.

83. **Interstate Commerce**—Conclusiveness of Findings.—Findings of the Interstate Commerce Commission that certain through rates are unreasonable and carry a presumption of correctness.—Interstate Commerce Commission v. Chicago, R. I. & P. Ry. Co., U. S. S. C., 30 Supp. Ct. 651.

84. **Intoxicating Liquors.**—Illegal Sale.—An employer engaged in illegal sale of liquor held liable for sale made by his employe.—Stack v. State, Okl., 109 Pac. 126.

85. **Jury**—Waiver.—Accused, except in a capital case, may waive the right of trial by a jury of 12 men competent to act as jurors.—Oborn v. State, Wis., 126 N. W. 737.

86. **Landlord and Tenant**—The attornment by a tenant of a landlord claiming the premises to another tenant held void as against the landlord and not to affect his possession.—Wiener v. Zweib, Tex., 128 S. W. 699.

87. **Larceny**—Fixtures.—Copper bond wires are not the subject of theft while they remain attached to the rails of a railway track.—State v. Fox, Conn., 76 Atl. 302.

88. **Libel and Slander**—Actionable per se.—To call a woman a bitch is not actionable per se, and, a fortiorari, it is not actionable per se to call a woman a hen or cat.—Krone v. Block, Mo., 129 S. W. 43.

89.——Damages.—In an action for libel, evidence of rumors connecting plaintiff with certain burnings in the community, the subject of the alleged libelous publication, held admissible in mitigation of damages.—Morgan v. Lexington Herald Co., Ky., 128 S. W. 1064.

90.——Malice.—A person publishing a false

article attacking the integrity of another, which ipso facto implies malice, cannot show the circumstances to avoid compensatory damages nor migrate such damages.—Murray v. Galbraith, Ark., 128 S. W. 1047.

91.——Pleading.—Generally the same particularity is necessary in a petition for slander as is required in an indictment or information.—Miller v. Dorsey, Mo., 129 S. W. 66.

92.——Title.—Slander of title differs from slander of person, in that it may be the result of written, as well as of spoken, words.—Rhodes v. Bugg, Mo., 129 S. W. 38.

93. **Licenses** — Classification. — Where the classification of trades, occupations, and professions for the purpose of imposing a license fee upon each class is based upon a genuine distinction, the classification is valid.—Metropolitan Life Ins. Co. v. City of Paris, Ky., 129 S. W. 112.

94.——Mandatory Injunction.—A mandatory injunction will lie to protect a license over the land of another.—Robbins v. Archer, Iowa, 126 N. W. 936.

95. **Life Estate**—Incumbrances.—A life tenant must pay the interest on incumbrances out of rents and profits, but if he pay off incumbrances, he is prima facie a creditor of the estate for the amount paid deducting interest he would have had to pay as life tenant.—Fuller v. Devolid, Mo., 128 S. W. .011.

96.——Remaindermen.—Purchase of land by a life tenant at a foreclosure sale will be deemed for the benefit of the remaindermen if they contribute within a reasonable time.—Peak v. Peak, Mo., 128 S. W. 981.

97. **Limitation of Action**—Non-Residence.—An action against a non-resident held not commenced until the completion of the service by publication.—Slater v. Roche, Iowa, 126 N. W. 925.

98. **Logs and Logging**—Sale of Standing Timber.—Grantee of standing trees held not entitled to enter on land to remove timber after time fixed in contract, though, if he does so, the grantor cannot recover the value of the trees.—Pierce v. Finerty, N. H., 76 Atl. 194.

99. **Mandamus**—Remanding Case to State Court.—The denial by a federal court of a motion to remand a cause to a state court cannot be revised by mandamus.—Ex parte Gruetter v. U. S. S. C., 30 Sup. Ct. 690.

100. **Marriage**—Place of Celebration.—A marriage valid where celebrated without the State is valiid in Nebraska, though such a marriage be prohibited there.—State v. Hand, Neb., 126 N. W. 1002.

101. **Master and Servant**—Regulation.—The failure of a master to make rules is not negligence which renders him liable for an injury to a servant, unless it appears from the nature of the business that the master in the exercise of reasonable care should have foreseen and anticipated the necessity of a rule which, if observed, would have prevented the injury.—Larsen v. O'Rourke Engineering Const. Co., 178 Fed. 541.

102. Discharge.—An employer may discharge an employee before expiration of the agreed term when he does not perform his duties in a proper and reasonable manner.—Sinsheimer v. Edward Weil Co., Tex., 129 S. W. 187.

103.——Fellow Servant.—Where a servant had been in the employ of a master for four or five years without complaint having been made by any one as to his efficiency, character, or habits, the master cannot be charged with negligence in retaining him.—Jackson v. Chicago, R. I. & P. Ry. Co., C. C. A., 178 Fed. 432.

104.——Assumption of Risk.—In an action for injuries to a servant, an allegation of assumed risk held not to allege that plaintiff assumed the risk of perils created or enchanced by defendant's negligence.—Obenchain v. Harris & Cole Bros., Iowa, 126 N. W. 960.

105.——Mining Company.—The liability of a mining company for injury to an employe caused in the operation of a railroad in connection with the mine is governed by the rules applying to ordinary railroads.—West Kentucky Coal Co. v. Davis, Ky., 128 S. W. 1074.

106.——Negligence per se.—Failure to equip a ripsaw with a divider which would have effectually prevented plaintiff's injury held negligence per se.—Obenchain v. Harris & Cole Bros., Iowa, 126 N. W. 960.

107.——Presumption.—In the absence of knowledge to the contrary, one may assume that his employer has performed his duties so as not to expose the employe to extraordinary hazards.—A. L. Clark Lumber Co. v. Northcutt, Ark., 129 S. W. 88.

108. **Mechanic's Liens**—Time to Sue.—Where a material man filed a second and amendatory lien claim within the 90-day period, the eight months within which suit to forclose could be brought ran from the filing of the second claim, though suit had been previously instituted to foreclose the first one and dismissed without prejudice.—Lindley v. McGlauflin, Wash., 109 Pac. 118.

109. **Mortgages**—Foreclosure.—A senior mortgagee need not be made a party to a foreclosure suit.—Porter v. Hamil, Ark., 128 S. W. 570.

110.——Rents and Profits.—A mortgage which does not by its terms give a lien upon the rents and profits creates a lien only on the hand.—Stokeley v. Flanders, Ky., 128 S. W. 608.

111. **Municipal Corporations**—Abutting Owners.—The benefits resulting to abutting property from the change of grade of the street must be considered in a connection with the disadvantages resulting therefrom in determining the measure of damages to abutting property.—Meardon v. Iowa City, Iowa, 126 N. W. 939.

112. **Negligence**—Contributory Negligence.—Contributory negligence does not justfy nonperformance of the duty to use due care not to injure another, but only relieves from liability to pay for its consequences.—Elliott v. New York, N. H. & H. R. Co., Conn., 76 Atl. 298.

113.——Children.—The fact of children having been seen playing around and near the pit for several days prior to the accident, though not pleaded, held admissible to prove the fact, alleged in the petition, that the lime pit maintained in a street, into which plaintiff's child fell, and the surroundings, were attractive to children.—Buttron v. Bridell, Mo., 129 S. W. 12.

114——Vis Major.—Where defendant's negligence concurs with an act of God in point of time and place, or directly contributes to plaintiff's damage, vis major is no defense.—Booker v. Southwest Missouri R. Co., Mo., 128 S. W. 1012.

115. **Notice**—Presumption.—The law imputes to a person knowledge of all facts which the exercise or ordinary diligence would by investigation and inquiry disclose.—Bergstrom v. Johnson, Minn., 126 N. W. 899.

116. **Nuisance**—Ordinance.—Where a city ordinance prohibited the storage of more than 200 gallons of kerosene or more than 100 gallons of gasoline in tanks, the construction of storage tanks having a capacity of 11,000 gallons within the city held to constitute a nuisance.—Texas Co. v. Fisk, Tex., 129 S. W. 188.

117. **Partnership**—Action.—In an action by a firm on a firm contract, one of the partners was a proper party, though not individually interested in the contract sued on because of an agreement between himself and the other partner, so that the court could not direct a finding for defendant because such partner had no individual interest in the contract.—Floore v. J. T. Burgher & Co., Tex., 128 S. W. 1152.

118. **Payment**—Partnership.—The giving of the individual note of the managing partner of a firm for a debt due from the firm was not a payment of the firm debt in the absence of an express acceptance of it as such.—Caswell v. Pure Bred Cattle Commission Co., Iowa, 126 N. W. 908.

119. **Physicians and Surgeons**—License.—That an employe of a licensed dentist not himself a licensed dentist, filled a tooth and collected a fee therefor, which he paid to his employer, did not constitute engaging in the practice of dentistry in violation of Pub. Acts 1907, c. 249.—State v. Faatz, Conn. 76 Atl. 295.

120. **Perjury**—Evidence.—On the trial of a defendant for perjury in swearing falsely in a former prosecution for another offense in which he was acquitted, evidence tending to show his guilt of such former offense is not admissible.—Chitwood v. United States, C. C. A., 178 Fed. 442.

121. **Pleading and Practice**—Dismissal.—Under the common law, as adopted in Missouri, plaintiff may dismiss at any time before verdict.—Hamlin v. Walker, Mo., 128 S. W. 945.

122. **Principal and Surety**—Ultra Vires.—A bond made to secure performance by a corporation of an ultra vires contract is binding on the sureties.—Mitchell v. Hydraulic Bldg. Stone Co., Tex., 129 S. W. 148.

123. **Quieting Title**—Cloud.—Where the question whether a judgment conveying title is void on its face is one of such grave doubt that the judgment will cast a cloud on the title, equity will remove it.—McLaughlin v. McLaughlin, Mo., 129 S. W. 21.

124. **Railroads**—Fences.—It is not negligence for a railroad company to fail to fence its station grounds in a village where it is not required by statute to do so.—Cox v. Chicago & N. W. Ry. Co., Neb., 126 N. W. 999.

125——Negligence.—Negligence of one who drove on the track at a crossing and collided with a train, held too remote to be contributory negligence if the company's negligence supervened and caused the collision.—Elliott v. New York, N. H. & H. R. Co., Conn., 76 Atl. 208.

126. **Release**—Honest Opionion.—A release executed on a mistaken, but honest, opinion of a physician as to the extent of plaintiff's injuries, held valid.—Nelson v. Chicago & N. W. R. Co., Minn., 126 N. W. 902.

127. **Removal of Causes**—Separable Action.—A joint action in a state court against two defendants for a tort, which is governed as to the two defendants by different statutes, fixing different grounds of liability and admitting of different defenses, is separable and is removable by one defendant, where the necessary diversity of citizenship exists as to such defendant, although the other defendant may be a citizen of the same state as plaintiff.—Jackson v. Chicago, R. I. & P. Ry. Co., 178 Fed. 432.

128. **Searches and Seizures**—Constitutionality.—An order of a school board excluding all pupils not vaccinated held not in conflict with Const. art. 1, sec. 9.—McSween v. Board of School Trustees of City of Ft. Worth, Tex., 129 S. W. 206.

129. **Shipping**—Seaworthy.—The term "seaworthy," as now construed, has relation to the article carried and the different compartments of the ship and their particular use as well as to the navigability of the vessel.—The Indrapura, D. C., 178. 591.

130. **Specific Performance**—Leases.—On sale of land, with an agreement by vendee to lease the buildings to vendor, where by a mistake the lease is not executed when the deed is made, the agreement to lease will be specifically enforced.—Jacoby v. Viele, Neb., 126 N. W. 1006.

131. **Street Railroads**—Crossing.—One approaching a street railroad held not required to exercise as high a degree of care as when approaching a steam railroad.—Dow v. Des Moines City Ry. Co., Iowa, 126 N. W. 918.

132.——Concurring Negligence.—Where a street car motorman and the driver of a team were both negligent, held, there can be no recovery for injury to team and driver, unless the motorman could in the exercise of ordinary care have prevented the accident after the driver got in a position of danger.—Clay v. People's Ry. Co., Del., 76 Atl. 319.

133. **Taxation**—Adverse Possession.—A purchaser at a tax sale held not a bona fide purchaser, but to take subject to the title and equities of one in the adverse possession of the land.—Adams v. Gossom, Mo., 129 S. W. 16.

134.——Lien—A tax against real estate subject to taxation is against the property, and not against the owner, and is a lien on the property prior to all other liens.—Meriwether v. Overly, Mo., 129 S. W. 1.

135.——Non-resident.—Where real estate of a non-resident is sold by the collector of taxes without giving the notice required for non-resident owners, the sale is void.—Roberts v. Moulton, Me., 76 Atl. 283.

136.——Special Franchise.—Right granted by city to maintain tunnel under street held not a special franchise taxable under Laws 1899, c. 712.—People v. Perley, 123 N. Y. Supp. 436.

137. **Telegraphs and Telephones**—Damages.—A telephone company is only liable for delay in furnishing connections for such damages as proximately result from such delay.—Volquardsen v. Iowa Telephone Co., Iowa, 126 N. W. 928.

138.——Addressee.—A sendee of a telegram held interested in the contract between the sender and telegraph company, so that he may sue for breach of contract, provided he has been damaged thereby.—Western Union Telegraph Co. v. E. F. Connell Land Co., Tex., 128 S. W. 1162.

139.——Mental Suffering.—The relationship of uncle and nephew is not necessarily so remote as to prevent recovery of damages for mental suffering arising from a telegraph company's negligent delay in delivering a message announcing the nephew's death.—Seddon v. Western Union Telegraph Co., Iowa, 126 N. W. 969.

140. **Trusts**—Express Parol.—An express parol trust to be engrafted on an absolute deed must be specific and clearly declared by the grantor, so that it may be executed by the trustee or enforced by the court.—Roth v. Schroeter, Tex., 129 S. W. 203.

141.——Mingling Funds.—Where a contract of conditional sale provided that the buyer should hold the proceeds in trust for the seller until the purchase price was paid, but the proceeds were mingled with the buyer's other funds and assets then was lost.—In re Agnew, D. C., 178 Fed. 478.

142.——Purchase at Own Sale.—Where a trustee becomes the purchaser at his own sale of the trust property, equity will, at the request of the cestui que trust, set the sale aside.—Linley v. Strang, Iowa, 126 N. W. 941.

143. **Vendor and Purchaser**—Assumption of Debt.—Where land is conveyed by a warranty deed subject to an incumbrance, it becomes a charge on the land, and while the grantee does not become personally liable, the land becomes a primary fund for payment of the debt.—Fuller v. Devolld, Mo., 128 S. W. 1011.

144. **Wills**—Construction.—Words occurring more than once in a will are presumed to be used always in the same sense when the context does not show a contrary intention.—In re Goetz's Estate, Cal., 109 Pac. 105.

145.——Interlacy.—In determining whether an issue devisavit vel non should be allowed, the proper test is whether upon all the evidence a verdict against the proponents of the will would be allowed to stand.—In re Donnelly's Estate, Pa., 76 Atl. 316.

146.——Limitations.—A limitation on a defeasible fee by the attempted creation of a reversion as to property not disposed of in the tenant's lifetime is void.—Easton v. Miller, Ky., 128 S. W. 1091.

147.——Mental Capacity.—Capacity to understand the effect of making one's will, and not actual understanding, is the test of mental capacity required of a testator.—Huffaker v. Beers, Ark., 128 S. W. 1040.

148.——Probate.—In proceedings to probate a will contested on the ground of mental incapacity, the evidence is allowed to take a wide range, and every fact throwing light on the issue is admissible.—McConnell's Ex'r v. McConnell, Ky., 129 S. W. 106.

149.——Testamentary Capacity.—In will contests involving questions of testamentary capacity, the evidence is permitted to take a wide range necessarily covering much of the life history of testator, and going largely into the relations existing between persons dealing with him.—Barber's Ex'r v. Baldwin's Ex'r, Ky., 128 S. W. 1092.